MOTION FILED
APR 16 1992

No. 119 Original

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

STATE OF CONNECTICUT, *et al.*,
Plaintiffs,
v.
STATE OF NEW HAMPSHIRE,
Defendant.

MOTION FOR LEAVE TO INTERVENE, BRIEF IN SUPPORT OF MOTION TO INTERVENE, AND COMPLAINT OF INTERVENORS

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MOTION FOR LEAVE TO INTERVENE

The United Illuminating Company, New England Power Company, The Connecticut Light & Power Company, Canal Electric Company, Montaup Electric Company, and Taunton Municipal Lighting Plant, respectfully move this Court for leave to intervene as plaintiffs in this action, pursuant to Rule 9(2) of the Rules of this Court and Rule 24 of the Federal Rules of Civil Procedure, and to file the accompanying Complaint.[1]

Respectfully submitted,

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[1] Pursuant to Sup. Ct. R. 29.1, we note that the parent companies of Intervenors are reflected in paragraph 4 of the Complaint. United Illuminating, New England Power, Connecticut Light & Power, and Montaup Electric own partial interests in one or more of the following companies: Yankee Atomic Electric Co., Vermont Yankee Nuclear Power Corp., Maine Yankee Atomic Power Co., and Connecticut Yankee Atomic Power Co.

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BRIEF IN SUPPORT OF MOTION TO INTERVENE

STATEMENT

This case involves a challenge by three States—Connecticut, Massachusetts, and Rhode Island—to the validity of various tax statutes enacted by the State of New Hampshire. The States invoked the original jurisdiction of this Court for their challenge, and, on January 27, 1992, this Court granted the States leave to file their complaint. 112 S. Ct. 962 (1992).

Plaintiffs' challenge focuses upon changes made to the New Hampshire tax code in 1991. At that time, New Hampshire enacted a new *ad valorem* tax on Nuclear Station property.[1] *See* 1991 N.H. Laws c. 354 (to be codified as N.H. Rev. Stat. Ann. ("RSA") Chapter 83-D.) It is undisputed by the parties that there is but one Nu-

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[1] The rate of the tax is .64 percent of assessed valuation. Nuclear Station property is assessed annually as of April 1.

clear Station property in New Hampshire: the Seabrook Nuclear Station. *See* Plaintiffs' Complaint, ¶ 6, at 5; Answer at 4. The tax thus, in both purpose and effect, is one levied solely against the Seabrook Station.[2]

The Seabrook Tax is directly linked, by means of a credit provision, to a second New Hampshire tax: the business profits tax. In the same Act that first imposed the Seabrook Tax, the New Hampshire legislature provided that any payments of the Seabrook Tax could be credited, dollar for dollar, against payments of the New Hampshire business profits tax. *See* 1991 N.H. Laws c. 354:2 (amending RSA 77-A:5). As a result, any business that pays the Seabrook Tax and has sufficient business in New Hampshire to use the full amount of the credit is assured of paying only one tax on the combined activities of owning nuclear property and earning business profits (until the credit is exhausted). A business that pays the Seabrook Tax but has insufficient business in New Hampshire to use the full amount of the credit has no such assurance.

The Act imposing the Seabrook Tax had a third effect addressed in plaintiffs' complaint: it made the New Hampshire franchise tax inapplicable to electric utilities. *See* 1991 N.H. Laws c. 354:3 and 4 (amending RSA 83-C:1 (II), (IV)). Prior to the effective date of the Act, New Hampshire electric utilities paid a franchise tax of one percent of their gross receipts, as defined by the statute.[3] *See* RSA 83-C:1. The tax was not imposed, however, on "receipts from the sale of gas or electricity for use outside of New Hampshire." *See* RSA 77-A:5. The State thus eliminated an old tax (the Franchise Tax), borne by in-state electric utilities and their customers,

[2] In their complaint and other papers, plaintiffs have referred to the tax by the shorthand designation "the Seabrook Tax." Intervenors will use the same designation.

[3] Payments of the franchise tax were allowed as a credit against the New Hampshire Business Profits tax.

and created a new tax (the Seabrook Tax), borne in large measure by out-of-state electric utilities and their customers.

Intervenors are electric utilities that, collectively, own approximately 38% of the Seabrook Station. *See* Intervenors' Complaint, ¶ 4. As owners, they are directly responsible for payment of the Seabrook Tax.[4] However, because each of the Intervenors does the vast majority of its business with customers outside of New Hampshire, none is able fully to protect itself against the dual burden of the Seabrook Tax and a tax on its business profits, as it would be able to do (up to the amount of the credit) if it conducted business solely in New Hampshire.

Intervenors believe that the scheme of taxation imposed by New Hampshire violates both the Constitution and federal law. As taxpayers, they have a direct, immediate, protectable interest in the outcome of this case. Intervenors seek intervention to assure that this interest is fully represented and protected.

REASONS FOR GRANTING INTERVENTION

The basis of intervention is simple and straightforward. The tax at the center of this case, the Seabrook Tax, is imposed directly on Intervenors, and the decision of this Court will finally determine whether New Hampshire may continue to enforce the challenged tax scheme or not. Intervenors' interest as taxpayers is not presently represented in the case.

This Court has noted that "it is not unusual to permit intervention of private parties in original actions." *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) (citing *Oklahoma v. Texas*, 258 U.S. 574 (1922)). In

[4] Each owner is liable for the Seabrook Tax in the proportion that its ownership interest bears to the total ownership. Intervenors, therefore, are responsible for approximately 38% of the Seabrook Tax.

Maryland v. Louisiana, while permitting intervention by taxpayers subject to the challenged tax, the Court noted that the taxpayers "ha[d] a direct stake in th[e] controversy" and that the granting of their motion to intervene would advance "the interest of a full exposition of the issues." *Id.* Intervenors, too, have a "direct stake" in the outcome of this case, and their intervention will assure "a full exposition of the issues."

Although this Court has no rule specifically governing motions for intervention in original cases, its rules provide that the Federal Rules of Civil Procedure, "when their application is appropriate, may be taken as a guide to procedure in an original action in this Court." Sup. Ct. R. 17.2. Rule 24 of the Federal Rules of Civil Procedure, in turn, provides for intervention as of right (Rule 24(a)) and permissive intervention (Rule 24(b)). As discussed below, Intervenors submit that their request for intervention may be granted under either provision.

I. *Intervenors Meet the Standards for Intervention as of Right.* To be entitled to intervention as of right, a proposed intervenor must demonstrate, *first*, that it "claims an interest relating to the property or transaction which is the subject of the action"; *second*, that it is "so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest"; and, *third*, that the interest to be protected is not "adequately represented by existing parties." Fed. R. Civ. P. 24(a).[5] Those requirements are met here.

To begin with, as previously noted, Intervenors have the most direct possible stake in the constitutionality of

[5] "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a).

the New Hampshire tax scheme: they pay the Seabrook Tax. Moreover, because their business activities are primarily conducted outside the State of New Hampshire, they do not have the assurance, available to Seabrook owners conducting business primarily within New Hampshire, that they will be protected against duplicative taxation of their nuclear property and their business profits. If the New Hampshire tax scheme is unlawful, as Intervenors believe that it is, then Intervenors may benefit from an overall reduction in their tax burden.[6]

This interest is not diminished by the fact that payments of the Seabrook Tax may be recovered through an increase in rates. In fact, New Hampshire has put into question whether taxes will be passed on, Answer at 13, and a proposed intervenor, Connecticut Office of Consumer Counsel, says that it will oppose recovery of the taxes through increased rates. *See* Connecticut Office of Consumer Counsel's Motion for Leave to Intervene as Plaintiff, ¶ 11. Quite plainly, if any of the tax burden is not passed through to consumers, then Intervenors will have to bear that burden themselves. But, even if all the burden is passed through, Intervenors will nevertheless suffer the economic effects of higher charges for their product. Either way, Intervenors have a concrete interest in the outcome of the case. *See also* 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1908, at 285 (1986) ("in cases challenging various statutory schemes as unconstitutional . . . the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention").

Intervenors' interests will also be decisively affected by the "disposition of this action." The decision of this

[6] We note that Intervenors have standing to challenge the New Hampshire tax scheme regardless of the possible means that New Hampshire might use to bring its system into compliance with the Constitution. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 7-8 (1989); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987).

Court will determine, once and for all, whether New Hampshire may employ the tax scheme that it has chosen. Lower federal courts have recognized that the effects of *stare decisis* may create a practical disadvantage sufficient to support intervention as of right. *See Chiles v. Thornburgh*, 865 F.2d 1197 (11th Cir. 1989); *United States v. Oregon*, 839 F.2d 635 (9th Cir. 1988). This conclusion would seem to apply with even greater force when the decision having *stare decisis* effect is one by this Court resolving the very issues that Intervenors seek to raise.

It is theoretically possible, of course, that, were Intervenors to bring suit in another forum, this Court might render a decision in that case before handing down a decision in the present one. But that possibility should not defeat intervention here for several reasons. First, it is highly unlikely that another case would proceed that rapidly. If it did not, then Intervenors (as well as the defendant) would simply have been put to a duplicative, and ultimately pointless, proceeding, the outcome of which is controlled by the decision in this case. And, in any event, there is no sound reason to force Intervenors into a second round of litigation in order to raise issues already pending before this Court. It would seem preferable to have the issues fully addressed at one time, by all interested parties, and in a single forum.[7]

Finally, Intervenors do not believe that their interest as taxpayers is now represented in the case. Although Intervenors accept that the plaintiff States have mounted a vigorous challenge to the New Hampshire taxes, the fact remains that their interest, as consumers, exists only to the extent that the Seabrook Tax is passed on. To the extent that any part of the tax must be absorbed

[7] The plaintiff States, as noted in their original papers, do not have ready access to another forum in which to raise their claims. *See* Plaintiffs' Brief in Support of Motion for Leave to File Complaint at 22-23 & n.17.

by Intervenors, or to the extent that Intervenors suffer economic effects resulting from higher rates, the States have asserted no particular stake in the outcome. Those interests can be represented only by Intervenors themselves.

Intervenors do not suggest that their interests with respect to the taxation by New Hampshire are antagonistic to the interests of the plaintiff States, just different. But, in circumstances like these, that should be enough. As Professors Wright, Miller, and Kane note in their treatise, "since the rule is satisfied if there is a serious possibility that the representation will be inadequate, all reasonable doubts should be resolved in favor of allowing the absentee, who has an interest different from that of any existing party, to intervene so that he may be heard in his own behalf." 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1909, at 346 (1986). That course is entirely appropriate here.

II. *Intervenors Meet the Standards for Permissive Intervention.* Intervention may also be granted "when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b).[8] Here, of course, the questions of law and fact are highly similar. Plaintiffs and Intervenors both contend that the New Hampshire taxation scheme violates

[8] "(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b).

the Constitution and federal law, and the factual grounds for their attack, while not fully identical, are overlapping.[9]

Rule 24(b) further states that "[i]n exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties," but there should be no serious concern about undue delay or prejudice here. Intervenors' motion comes only a short time after the filing of defendant's answer, and Intervenors' complaint does not seek to enlarge or complicate the issues presented. Moreover, if permitted to intervene, Intervenors would expect to coordinate any factual or legal presentations with plaintiffs to avoid unnecessary duplication.

It seems likely, in fact, that the presence of Intervenors, like the presence of intervenors in *Maryland v. Louisiana*, *supra*, will assist in a "full exposition of the issues." Although Intervenors do not think that the claims here will necessarily require extensive factual development, it is nonetheless the case that, if facts about the precise effects of the New Hampshire taxation scheme are deemed important, many of those facts lie most readily within the knowledge of Intervenors, rather than the existing parties. It is, after all, through discriminatory taxation *of Intervenors* that New Hampshire is able to threaten the interest of consumers that plaintiffs represent, and Intervenors most effectively can marshal any facts needed to demonstrate the nature and extent of the discrimination.

Intervention, as previously noted (*supra* p. 6), will also advance the interests in judicial economy as a whole. Given the fact that this case almost surely will decide the lawfulness of the New Hampshire taxation scheme, it

[9] As consumers, plaintiffs address the effects of the New Hampshire taxation scheme as it is reflected in rates charged by Intervenors. For their part, Intervenors address the effects of the taxation scheme on them as taxpayers. *See supra* pp. 3-7.

simply makes sense to allow all vitally interested parties to present their legal and factual arguments with respect to that scheme. Plaintiffs have properly invoked the original jurisdiction of this Court, and the Court should allow Intervenors to present their claims before this Court as well.

CONCLUSION

The motion for leave to intervene should be granted.

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COMPLAINT OF INTERVENORS

The United Illuminating Company, New England Power Company, The Connecticut Light & Power Company, Canal Electric Company, Montaup Electric Company, and Taunton Municipal Lighting Plant, complain and allege as follows:

JURISDICTION AND STANDING

1. The jurisdiction of this Court is based upon art. III, § 2, cl. 1 and 2 of the United States Constitution and 28 U.S.C. § 1251(a)(1) (1991).

2. The original complaint filed by plaintiffs seeks a declaratory judgment, pursuant to 28 U.S.C. § 2201 (1991), that the New Hampshire "Tax on Nuclear Station Property," 1991 N.H. Laws c. 354 (to be codified as N.H. Rev. Stat. Ann. ("RSA"), Chapter 83-D) (the "Seabrook Tax"), violates the rights and protections af-

forded to plaintiffs by the United States Constitution under art. VI, cl. 2 (Supremacy Clause); art. I, § 8 (Commerce Clause); the Equal Protection Clause of the Fourteenth Amendment; and art. IV, § 2 cl. 1 (Privileges and Immunities Clause); it also seeks to enjoin enforcement of the tax.

3. The Seabrook Nuclear Station, located in Seabrook, New Hampshire, is a facility used for the generation and transmission of electricity in interstate and intrastate commerce.

4. Intervenors are owners of the Seabrook Nuclear Station, and are liable for payment of taxes pursuant to the provisions of the Seabrook Tax. The individual intervenors, and their respective ownership interests in the Seabrook Nuclear Station, are as follows:

a. The United Illuminating Company is a Connecticut corporation with its principal place of business in New Haven, Connecticut. The United Illuminating Company owns and leases an aggregate 17.50% interest in the Seabrook Nuclear Station.

b. New England Power Company ("NEP"), a wholly owned subsidiary of New England Electric System ("NEES"), is a Massachusetts corporation with a principal place of business in Massachusetts. NEP owns an undivided 9.9% common interest in the Seabrook Nuclear Station. It sells power wholesale to two other wholly owned subsidiaries of NEES, Massachusetts Electric Company and Narragansett Electric Company, passing on to them the costs of the Seabrook Tax.

c. The Connecticut Light and Power Company, a wholly owned subsidiary of Northeast Utilities, is a Connecticut corporation with its principal place of business in Berlin, Connecticut. The Connecticut Light and Power Company owns 4.05985% of the Seabrook Nuclear Station.

d. Canal Electric Company, a wholly owned subsidiary of Commonwealth Energy System ("CES"), is a Massachusetts Business Trust with its principal place of business in Cambridge, Massachusetts. Canal Electric Company owns a 3.52% interest in the Seabrook Nuclear Station. It sells power wholesale to two other wholly owned subsidiaries of CES, Cambridge Electric Light Company and Commonwealth Electric Company, passing on the costs of the Seabrook Tax.

e. Montaup Electric Company is a wholly owned subsidiary of Eastern Edison Company ("EEC"), which, in turn, is a wholly owned subsidiary of Eastern Utilities Associates ("EUA"), with its principal place of business in Boston, Massachusetts. Montaup Electric Company owns 2.89% of the Seabrook Nuclear Station. It sells power wholesale to EEC and another wholly owned subsidiary of EUA, Blackstone Valley Electric Company, passing on the costs of the Seabrook Tax.

f. Taunton Municipal Lighting Power Plant is a quasi-autonomous department of the City of Taunton, a municipal corporation situated in Bristol County, Massachusetts. Taunton Municipal Lighting Plant owns 0.10034% of Seabrook Nuclear Station.

5. The defendant is the State of New Hampshire.

THE NEW HAMPSHIRE TAXATION SCHEME

6. The Seabrook Tax imposes an *ad valorem* tax upon the value of nuclear station property at the rate of 0.64 percent of valuation. Chapter 354:1 (H.B. 64, § 1) to be codified as RSA 83-D:1. Each of the intervenors is liable for the tax in proportion to its share of the ownership of the Seabrook Nuclear Station.

7. The Seabrook Tax is linked to a second New Hampshire tax, the New Hampshire Business Profits Tax, by virtue of a credit provision. Pursuant to Chapter 354:2 (H.B. 64, § 2), amending RSA 77-A:5, payment of the Seabrook Tax entitles the taxpayer to a dollar-for-dollar credit against tax on its business profits, but only to the

extent that the business profits are attributable to business done in New Hampshire.

8. At the same time that New Hampshire enacted the Seabrook Tax, and provided for credit of that tax against the New Hampshire Business Profits Tax, it amended the New Hampshire Franchise Tax to exclude electric utilities from the definition of "public utility" and to exclude sales of electricity from the coverage of that tax. Chapter 354:3 and 4 (H.B. 64, §§ 3 and 4), amending RSA 83-C:1 (II), (IV).

9. The New Hampshire taxation scheme is further discussed at paragraphs 5 through 23 of plaintiffs' complaint. The allegations of those paragraphs are incorporated herein by reference.

FIRST CAUSE OF ACTION

10. Intervenors reallege, as though set forth in full, the allegations contained in paragraphs 1 through 9.

11. The operation of the New Hampshire taxation scheme constitutes a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity.

12. The operation of the New Hampshire taxation scheme directly and indirectly results in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

13. The operation of the New Hampshire taxation scheme is in conflict with the provisions of 15 U.S.C. § 391, which prohibit discriminatory taxation on or with respect to the generation or transmission of electricity, and the Supremacy Clause, art. VI of the United States Constitution.

SECOND CAUSE OF ACTION

14. Intervenors reallege, as though set forth in full, the allegations contained in paragraphs 1 through 12.

15. The operation of the New Hampshire taxation scheme results in discriminatory taxation of businesses like intervenors that have ownership interests in the Seabrook Nuclear Station but do not conduct sufficient business activities in New Hampshire to be eligible for full use of the credit provided by Chapter 354:2 (H.B. 64, § 2), amending RSA 77-A:5, against tax on their business profits.

16. The operation of the New Hampshire taxation scheme is not fairly apportioned in that it exposes businesses like intervenors doing business in interstate commerce to the risk of multiple taxation on its ownership of the Seabrook Nuclear Station and on its business profits but protects businesses doing business solely in intrastate commerce from the risk of such multiple taxation.

17. The burdens of the New Hampshire taxation scheme are not fairly related to the services provided by New Hampshire.

18. The operation of the New Hampshire taxation scheme constitutes an impermissible burden on interstate commerce, in violation of art. I, § 8, cl. 3, of the United States Constitution (Commerce Clause).

THIRD CAUSE OF ACTION

19. The plaintiffs reallege, as though set forth in full, the allegations contained in paragraphs 1 through 12.

20. The operation of the New Hampshire taxation scheme, without legitimate or rational basis, imposes unequal and discriminatory tax burdens on businesses like intervenors that have ownership interests in the Seabrook Nuclear Station but do not conduct sufficient business activities in New Hampshire to be eligible for full use of the credit provided by Chapter 354:2 (H.B. 64, § 2), amending RSA 77-A:5, against tax on their business profits.

21. The operation of the New Hampshire taxation scheme deprives intervenors of the equal protection of the laws guaranteed under the Fourteenth Amendment to the United States Constitution.

WHEREFORE, intervenors respectfully request that this Court:

(A) Declare, pursuant to 28 U.S.C. § 2201 (1991), that the operation of the New Hampshire taxation scheme is contray to the United States Constitution and the laws of the United States;

(B) Issue a permanent injunction prohibiting the defendant, its agents and employees from enforcing the New Hampshire taxation scheme;

(C) Grant intervenors their costs and such other relief as the Court may deem just and proper.

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